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Wills and Trusts

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WILLS AND TRUSTS

Gerry W. Beyer*

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THIS article discusses judicial developments relating to the Texas law of intestacy, wills, estate administration, trusts, and other estate planning matters during the Survey period of October 1, 2001 through November 1, 2002. The reader is warned that not all cases decided during the Survey period are presented and not all aspects of each cited case are analyzed. You must read and study the full text and petition history of each case before relying on it or using it as precedent.

The discussion of most cases includes a moral, that is, the important lesson to be learned from the case. By recognizing situations which have lead to time consuming and costly litigation in the past, the reader may be able to reduce the likelihood of the same situations arising with his or her clients.

I. INTESTACY

A. SPOUSAL DETERMINATION

The normally simple matter of ascertaining the identity of a decedent's spouse may actually cause more problems than anticipated, as demonstrated in the case of *In re Estate of Loveless*.¹ After Intestate's death, two women claimed to be Intestate's spouse.² Rosa claimed to be married to Intestate while Wanda asserted that Intestate had divorced Rosa and married her.³ Wanda moved for summary judgment that she was Intestate's spouse and presented evidence including a divorce decree, marriage certificate, pleadings in which Intestate referred to Rosa as his ex-spouse, and income tax returns.⁴ To counter this evidence, Rosa produced a Honduran marriage certificate showing that Intestate remarried Rosa four months after they were originally divorced.⁵ The court granted Wanda's motion and Rosa appealed.⁶

The appellate court reversed because Rosa presented evidence sufficient to raise a genuine issue of material fact as to whether she had re-

1. *In re Estate of Loveless*, 64 S.W.3d 564 (Tex. App.—Texarkana 2001, no pet.).

2. *Id.* at 568.

3. *Id.*

4. *Id.* at 571.

5. *Id.* at 571-72.

6. *Id.* at 572.

married Intestate, which would have made Wanda's marriage invalid.⁷ Rosa had a marriage certificate dated after their divorce and there was no evidence showing that Rosa and Intestate were subsequently re-divorced.⁸ Wanda did not produce evidence to show as a matter of law that Rosa's remarriage was invalid or that they were divorced prior to Wanda and Intestate's marriage.⁹ In addition, the court determined that Rosa was not equitably or judicially estopped from claiming to have remarried Intestate even though Rosa had sued to enforce the divorce decree after allegedly remarrying Intestate and did not object when her attorney referred to Intestate as her ex-husband.¹⁰

B. NON-MARITAL CHILD

The importance of purchasers of real property obtaining title insurance to protect against the risk that a non-marital child of one of the prior owners will successfully assert a claim to the property is shown by the case of *Jeter v. McGraw*.¹¹

Husband and Wife were married in 1931.¹² In 1935, Husband fathered Non-Marital Child.¹³ Husband died in 1947, still married and without other children, owning a 25% interest in certain real property as his community property share.¹⁴ In the early 1980s, Wife conveyed all of her interest in this property to Grantee.¹⁵ Non-Marital Child now claims that Husband's 25% passed to him under intestacy, rather than to Wife.¹⁶ On the other hand, Grantee asserts that Non-Marital Child must establish paternity under the statutes as they existed when Husband died.¹⁷ Grantee thus argues that Non-Marital Child is precluded from inheriting because the statute permitted a non-marital child to inherit from the father only if the father subsequently married the non-marital child's mother.¹⁸ The trial court ruled in favor of Grantee, and Non-Marital Child appealed.¹⁹

The appellate court reversed and remanded the case for reconsideration by the trial court.²⁰ The court first examined Grantee's claim that Non-Marital Child is precluded from asserting paternity by the then-existing statute.²¹ The court indicated that it would be unconstitutional to

7. *Id.* at 580.

8. *Id.* at 571-72.

9. *Id.* at 576.

10. *Id.* at 579-80.

11. *Jeter v. McGraw*, 79 S.W.3d 211 (Tex. App.—Beaumont 2002, pet. denied).

12. *Id.* at 212.

13. *Id.*

14. *Id.*

15. *Id.* at 213.

16. *Id.* at 214.

17. *Id.* at 213.

18. *Id.*

19. *Id.* at 212.

20. *Id.* at 216.

21. *Id.* at 213.

apply this statute retroactively,²² citing both Texas and United States Supreme Court opinions, which have held that statutes such as the 1947 Texas provision are unconstitutional and may not be given effect.²³

Grantee next raised the affirmative defense of the running of the four-year statute of limitations because Non-Marital Child knew about his true paternity for decades more than four years and did not timely pursue his claim.²⁴ The court examined the two leading Texas cases on the issue and found a key distinguishing point.²⁵ In *York v. Flowers*,²⁶ the non-marital child was allowed to pursue her claim despite the passage of more than four years because the suit was for the recovery of certain real property and thus outside of the residuary four year period in section 16.051 of the Texas Civil Practice and Remedy Code.²⁷ However, the non-marital children in *Cantu v. Sapenter*²⁸ were precluded from asserting their claims after the four year period elapsed because the action was only to establish heirship and there was no real property issue before the court.²⁹ Accordingly, Non-Marital Child was not bound by the four year statute of limitations because he is attempting to recover specific real property.³⁰ The court, however, notes that Non-Marital Child could be barred by adverse possession statutes and suggests that this issue be considered by the trial court.³¹

II. WILLS

A. TESTAMENTARY CAPACITY

1. Temporal Nature of Evidence

*In re Neville*³² serves as an important reminder that a proponent of a will may need to present evidence of the testator's capacity, not just on the date of will execution, but with regard to surrounding time periods as well.³³ The jury found that Testatrix lacked testamentary capacity when she executed a will in 1998 and thus the trial court admitted Testatrix's 1992 will to probate.³⁴ Proponents of the 1998 will appealed on the basis that there was direct evidence that Testatrix had capacity on the date she executed the 1998 will.³⁵

The appellate court affirmed.³⁶ Proponents asserted that the Supreme

22. *Id.* at 215.

23. *Id.* at 213-16.

24. *Id.* at 215.

25. *Id.*

26. *York v. Flowers*, 872 S.W.2d 13 (Tex. App.—San Antonio 1994, writ denied).

27. *Id.* at 16 (citing TEX. CIV. PRAC. & REM. CODE § 16.051 (Vernon 1997)).

28. *Cantu v. Sapenter*, 937 S.W.2d 550 (Tex. App.—San Antonio 1996, writ denied).

29. *Jeter*, 79 S.W.3d at 215-16.

30. *Id.* at 216.

31. *Id.*

32. *In re Neville*, 67 S.W.3d 522 (Tex. App.—Texarkana 2002, no pet.).

33. *Id.* at 523-24.

34. *Id.* at 523.

35. *Id.*

36. *Id.* at 527.

Court of Texas case of *Lee v. Lee*³⁷ should be interpreted as prohibiting the consideration of evidence of a testatrix's mental condition before or after the signing of the will if there is direct evidence of the testatrix's mental soundness on the actual date of will execution.³⁸ The court rejected this analysis as follows:

It has always been the rule in Texas that, although the proper inquiry is whether the testator had testamentary capacity at the time he executed the will, the court may *also* look to the testator's state of mind at other times if those times tend to show his state of mind on the day the will was executed. Evidence pertaining to those other times, however, must show that the testator's condition persisted and probably was the same as that which existed at the time the will was signed.³⁹

The court examined the evidence, such as testimony from doctors that Testatrix had a brain tumor that adversely affected her mental soundness at all times.⁴⁰ This evidence, the court concluded, was sufficient to support the jury's finding that Testatrix lacked capacity even though Proponents presented the testimony of several individuals which tended to show that Testatrix had capacity on the date she executed the 1998 will.⁴¹

2. Sufficiency of Evidence

In the case of *In re Estate of Graham*,⁴² Testator executed a will naming two of his nieces as the primary beneficiaries.⁴³ Testator's seven other nieces and nephews contested the will on several grounds including lack of testamentary capacity.⁴⁴ The trial court determined that Testator had testamentary capacity and the contestants appealed.⁴⁵

The appellate court affirmed.⁴⁶ The court reviewed the extensive evidence the will's proponents submitted and held that it was sufficient to support the trial court's grant of summary judgment.⁴⁷ The court explained that the contestants did not submit any evidence raising a fact issue regarding the testator's capacity to execute the will.⁴⁸ Accordingly, it is essential for a person contesting a will on the basis of lack of testamentary capacity to present evidence to support the allegation.⁴⁹

37. *Lee v. Lee*, 424 S.W.2d 609 (Tex. 1968).

38. *In re Neville*, 67 S.W.3d at 524.

39. *Id.* at 525.

40. *Id.*

41. *Id.* at 526-27.

42. *In re Estate of Graham*, 69 S.W.3d 598 (Tex. App.—Corpus Christi 2001, no pet.).

43. *Id.* at 602.

44. *Id.*

45. *Id.*

46. *Id.* at 612.

47. *Id.* at 608.

48. *Graham*, 69 S.W.3d at 607-08.

49. *Id.* at 606.

B. TESTAMENTARY INTENT

*In re Estate of Graham*⁵⁰ also demonstrates that a person contesting a will on the basis of lack of testamentary intent must present evidence to support the allegation. Testator executed a will naming two of his nieces as the primary beneficiaries.⁵¹ Testator's seven other nieces and nephews contested the will on several grounds including lack of testamentary intent.⁵² The trial court held that Testator executed the will with testamentary intent,⁵³ and the contestants appealed.⁵⁴

The appellate court affirmed.⁵⁵ The court noted that the instrument was called a will and disposed of Testator's property.⁵⁶ Testator had discussed the will with others and handwrote the document before having another person type it for him.⁵⁷ This evidence was sufficient to support the trial court's grant of summary judgment, especially in light of the contestants' failure to present any evidence to negate the existence of testamentary intent.⁵⁸

C. SELF-PROVING AFFIDAVIT

In re Estate of Graham further shows the importance of having the self-proving affidavit track the language provided in section 59 of the Texas Probate Code to avoid claims the affidavit is not in substantial compliance with the statutory form.⁵⁹ Testator executed a will naming two of his nieces as the primary beneficiaries.⁶⁰ Testator's seven other nieces and nephews contested the will on several grounds, including failure to comply with the formalities of a valid will.⁶¹ The trial court determined that the will met the requirements of section 59,⁶² and the contestants appealed.⁶³

The appellate court affirmed.⁶⁴ Although the self-proving affidavit was not in the form provided in section 59 of the Texas Probate Code, it was subscribed and acknowledged by the testator and subscribed and sworn to by the witnesses, and thus it was in substantial compliance.⁶⁵ The self-proving affidavit served as prima facie evidence of the will's proper execution, and the contestants presented no evidence to rebut the affidavit.⁶⁶

50. *Id.* at 598.

51. *Id.* at 602.

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.* at 612.

56. *Id.* at 606.

57. *Id.*

58. *Id.* at 608.

59. TEX. PROB. CODE ANN. § 59 (Vernon 2003).

60. *Graham*, 69 S.W.3d at 602.

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.* at 612.

65. *Id.* at 604.

66. *Id.* at 604-05.

D. CONSTRUCTION

1. *Restraint on Alienation*

In *Williams v. Williams*,⁶⁷ Testator devised real property to his Children.⁶⁸ The devise provided that if any child wanted to sell his or her share to someone other than Testator's Siblings, the written consent of all of the surviving Siblings was required.⁶⁹ The devise further provided that after all Siblings die, Children may sell to anyone, but the descendants of Siblings have a right of first refusal.⁷⁰ Two of the children conveyed their interests to third parties without obtaining the prior consent of surviving Siblings.⁷¹ The remaining children sued to set aside the sales for violating the terms of the devise.⁷² The trial court granted summary judgment in favor of the selling children.⁷³

The appellate court affirmed.⁷⁴ The provision requiring Testator's Siblings to approve a sale is a restraint on alienation that is against public policy, and is therefore not enforceable.⁷⁵ The court rejected the claim that the will merely created rights of first refusal;⁷⁶ only after all of Testator's Siblings are deceased does the will impose a right of first refusal on Siblings' descendants.⁷⁷ Accordingly, a person wishing to impose restrictions on alienation should consider other techniques, such as a trust.

2. *Powers of Executor*

A testator should carefully select words that clearly impose mandatory or precatory obligations as the testator desires. A testator should also avoid mixing words which arguably could reflect conflicting intents to avoid problems such as those that arose in *Vinson v. Brown*.⁷⁸ In *Brown*, Testator's will provided that Executor may sell any of Testator's real property, including land in a particular subdivision.⁷⁹ In a subsequent clause, Executor was given the authority to continue Testator's development of that subdivision.⁸⁰ Owners of property in the subdivision asserted that the will required Executor to finish developing the land as a subdivision before selling it.⁸¹

The court held that Executor was under no obligation to develop the

67. *Williams v. Williams*, 73 S.W.3d 376 (Tex. App.—Houston [1st Dist.] 2002, no pet.).

68. *Id.* at 378.

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.* at 379.

74. *Id.* at 380.

75. *Id.* at 379.

76. *Id.* at 380.

77. *Id.*

78. *Vinson v. Brown*, 80 S.W.3d 221 (Tex. App.—Austin 2002, no pet.).

79. *Id.* at 225.

80. *Id.*

81. *Id.* at 230.

land.⁸² The court refused to interpret the word “direct” in the phrase “authorize, empower, and direct” as imposing on Executor a mandatory duty to develop the land.⁸³ The court also held that the specific provision dealing with the subdivision did not trump the prior provision granting Executor the power to sell.⁸⁴

E. WILL CONTESTS GENERALLY

A will contestant must present evidence to raise a genuine or material fact issue to withstand the proponent’s motion for summary judgment because the failure to do so may lead to a summary judgment against the contestant, as in the case of *In re Estate of Flores*.⁸⁵ Testator’s will did not provide for or mention Son, a child who was born out of wedlock but whose paternity was established over a decade earlier by a court judgment.⁸⁶ In the section of the will listing Testator’s children, Testator named his other children but not Son.⁸⁷ Because Son was not a beneficiary of the will, he filed a will contest on a variety of grounds including forgery, lack of proper formalities, mistake, and lack of testamentary capacity.⁸⁸ The trial court granted summary judgment against Son on the basis that Son’s evidence was too weak to support any of the will contest grounds; that is, his evidence gave rise only to speculation, suspicion, and surmise rather than to material or genuine issues of fact.⁸⁹ Son appealed.⁹⁰

The appellate court affirmed.⁹¹ The court reviewed Son’s evidence and determined that the trial court was correct in determining that the evidence was insufficient to raise jury issues on any of the contested grounds.⁹²

F. UNDUE INFLUENCE

A person contesting a will on the basis of undue influence must present evidence beyond mere surmise, opportunity, or suspicion, as seen in the case of *In re Estate of Graham*.⁹³ In *Graham*, Testator executed a will naming two of his nieces as the primary beneficiaries.⁹⁴ Testator’s seven other nieces and nephews contested the will on several grounds, including that Testator executed the will while being subjected to undue influ-

82. *Id.* at 231.

83. *Id.*

84. *Id.*

85. *In re Estate of Flores*, 76 S.W.3d 624 (Tex. App.—Corpus Christi 2002, no pet.).

86. *Id.* at 627.

87. *Id.*

88. *Id.*

89. *Id.* at 628-29.

90. *Id.* at 629.

91. *Id.* at 631.

92. *Id.*

93. *Graham*, 69 S.W.3d 598.

94. *Id.* at 602.

ence.⁹⁵ The appellate court affirmed the trial court's grant of a summary judgment that Testator did not execute the will under undue influence.⁹⁶ The court examined both the family situation and facts surrounding the execution of the will and found that there was no evidence to support the contestant's allegation of undue influence.⁹⁷

G. REMAINDER BENEFICIARY KILLING LIFE TENANT

*Medford v. Medford*⁹⁸ points out the dangers of failing to plead and prove the elements necessary to obtain the desired relief. Father devised a life estate in a house to Mother with the remainder passing to Son One and Son Two.⁹⁹ Son One killed Mother and was convicted of causing serious bodily injury to an elderly person.¹⁰⁰ Son Two rented the house.¹⁰¹ Son One sued to recover one-half of the rental income based on his status as a tenant in common.¹⁰² The trial court granted a take nothing summary judgment in favor of Son Two.¹⁰³ Son One appealed.¹⁰⁴

The appellate court reversed.¹⁰⁵ The court cited Article I, Section 21 of the Texas Constitution¹⁰⁶ and Probate Code § 41(d),¹⁰⁷ which provides that a conviction does not cause a corruption of the blood or forfeiture of property.¹⁰⁸ Thus, the only way Son Two could prevent Son One from receiving the rental income was to demonstrate that a constructive trust should be imposed on Son One's share of the house because he caused the death of the life tenant.¹⁰⁹ The appellate court held that the conviction alone was not sufficient to support the trial court's imposition of a constructive trust.¹¹⁰ Son Two failed to present evidence regarding why he should be the beneficiary of the constructive trust and failed to identify the property over which the constructive trust should be imposed.¹¹¹ The court also concluded that the trial court's take nothing judgment could not be read as imposing a constructive trust.¹¹²

95. *Id.*

96. *Id.* at 611.

97. *Id.* at 610-11.

98. *Medford v. Medford*, 68 S.W.3d 242 (Tex. App.—Fort Worth 2002, no pet.).

99. *Id.* at 245.

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.* at 245.

105. *Id.* at 250.

106. TEX. CONST. art. I, § 21.

107. TEX. PROB. CODE ANN. § 41(d) (Vernon 2003).

108. *Medford*, 68 S.W.3d at 248.

109. *Id.*

110. *Id.* at 249.

111. *Id.* at 250.

112. *Id.*

III. ESTATE ADMINISTRATION

A. JURISDICTION

1. *Resolving Concurrent Jurisdiction*

When a problem of concurrent jurisdiction arises, the proper remedy is to file a plea in abatement with the court lacking dominant jurisdiction. Failing to remember this proper remedy caused problems in *Tovias v. Wildwood Properties Partnership*.¹¹³ Heirs filed a declaration of heirship and a wrongful death suit in a county court at law.¹¹⁴ Later, Heirs filed a similar wrongful death suit in a district court in another county.¹¹⁵ One of the defendants filed a plea to the jurisdiction to contest the district court's subject matter jurisdiction.¹¹⁶ The trial court granted the plea,¹¹⁷ and Heirs appealed.¹¹⁸

The appellate court reversed,¹¹⁹ holding that the district court had subject matter jurisdiction over the wrongful death suit concurrently with the county court at law.¹²⁰ Defendants should have filed a plea in abatement because the county court at law had dominant jurisdiction (the suit was filed in county court first).¹²¹ Defendant was not entitled to the greater remedy of dismissal because the district court had subject matter jurisdiction and may have been able to exercise it under certain circumstances.¹²²

2. *Suit Against "Executor"*

A decedent's estate is not a legal entity, and thus a plaintiff should sue the personal representative of a decedent, not the decedent's estate. Failure to remember this basic principle caused the Plaintiffs in *Waste Disposal Center, Inc. v. Larson*¹²³ considerable difficulty. Plaintiffs sued "the Estate of Decedent,"¹²⁴ and Estate appeared and participated in the case.¹²⁵ At the end of the trial, Estate obtained a directed verdict on jurisdictional grounds because the estate of a deceased person is not a legal entity.¹²⁶ Plaintiffs appealed.¹²⁷

The appellate court affirmed.¹²⁸ The court began its analysis by ex-

113. *Tovias v. Wildwood Props. P'ship*, 67 S.W.3d 527 (Tex. App.—Houston [1st Dist.] 2002, no pet.).

114. *Id.* at 528.

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.* at 529.

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. *Waste Disposal Ctr., Inc. v. Larson*, 74 S.W.3d 578 (Tex. App.—Corpus Christi 2002, pet. denied).

124. *Id.* at 586.

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

plaining that an estate is not a legal entity that is capable of being sued.¹²⁹ This defect is a matter of fundamental jurisdiction which cannot be waived because no one is named as a defendant, and thus, there is no one to waive the defect.¹³⁰ Estate's appearance and participation in the case was irrelevant because Plaintiffs did not sue by name or serve the personal representative of the estate.¹³¹ No estoppel to assert lack of jurisdiction arose because the personal representative did not appear or participate in the lawsuit.¹³²

3. Title Issues

The importance of carefully examining probate orders to ensure that they correctly state the property interests to which the beneficiaries are entitled is demonstrated in *Garza v. Rodriguez*.¹³³ Correction of errors at a later time may be difficult or perhaps impossible, resulting in the intended beneficiaries losing their interests.

Testatrix's will granted Nephew a fee simple interest in her estate, subject to a shifting executory interest in Sister and her heirs if Nephew died without lawful issue of his body.¹³⁴ However, the court order issued by the constitutional county court of Starr County in 1957 closing Testatrix's estate appeared to grant fee simple absolute title to Nephew.¹³⁵ The order did not mention Sister's springing executory interest.¹³⁶ No one challenged this order.¹³⁷ Nephew died without lawful issue and Sister's heirs asserted ownership to the property by filing a will construction action in district court in 1986.¹³⁸ In the 2000 case of *Garza v. Rodriguez*,¹³⁹ the appellate court affirmed the trial court's dismissal of the action because of lack of jurisdiction.¹⁴⁰

Sister's heirs then filed a lawsuit in the statutory county court of Starr County to establish their interest.¹⁴¹ Nephew's heirs filed a motion to dismiss, asserting that this suit was a collateral attack on a final order issued by the constitutional county court in 1957.¹⁴² Sister's heirs responded by alleging that the 1957 order did not directly resolve the title issue raised by the springing executory interest and that if the order had divested Sister's heirs of the interest, the court lacked jurisdiction to do so.¹⁴³ The trial court granted the motion to dismiss and Sister's heirs

129. *Id.*

130. *Id.*

131. *Id.* at 587.

132. *Id.*

133. *Garza v. Rodriguez*, 87 S.W.3d 628 (Tex. App.—San Antonio 2002, pet. denied).

134. *Id.* at 630.

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*; see *Garza*, 18 S.W.3d at 696.

139. *Garza v. Rodriguez*, 18 S.W.3d 694 (Tex. App.—San Antonio 2000, reh'g denied).

140. *Id.* at 695.

141. *Garza*, 87 S.W.3d at 630.

142. *Id.*

143. *Id.* at 630-31.

appealed.¹⁴⁴

The appellate court reversed.¹⁴⁵ The court held that the constitutional county court lacked jurisdiction under the laws as they existed in 1957 to construe Testatrix's will to divest any party of any title interest.¹⁴⁶ Thus, the 1957 order either did not resolve the title matter or, if it did, the order was void and subject to collateral attack.¹⁴⁷ The court then concluded that the statutory county court had jurisdiction to resolve the title issue.¹⁴⁸

Note that the appellate court was careful to explain that it was not commenting on the merits of Sister's heirs' claim to the property interest.¹⁴⁹

B. APPEAL

1. Determination of Heirship

A party appealing a probate judgment should clearly indicate to the appellate court the reason why the party believes the court has jurisdiction to hear the appeal. As a matter of course, this issue should be addressed in the appellate brief. The case of *In re Estate of Loveless*¹⁵⁰ demonstrates the problems that may arise when the appellant fails to follow this advice. Although neither party raised the issue of the finality of the lower court's judgment, the appellate court provided a detailed analysis of whether it had the ability to consider the appeal.¹⁵¹ The court reviewed the case under the test set forth in the Texas Supreme Court case of *Crowson v. Wakeham*,¹⁵² which provides that an order in a probate case is final for appellate purposes when (1) a statute declares that a specified phase of the probate proceedings is final and appealable, (2) the order disposes of all issues in the phase of the proceeding for which it was brought, or (3) a particular order is made final by a severance order meeting the usual severance criteria.¹⁵³

Although section 55(a) of the Texas Probate Code provides that a determination of heirship is a final and appealable judgment,¹⁵⁴ the heirship determination in this case was not final because it did not contain all of the elements required by section 54.¹⁵⁵ Although the trial court order appears interlocutory because the pleadings raise issues not disposed of in the order, the court held that the action meets the requirements for severance and thus severed the action in the interest of judicial effi-

144. *Id.* at 631.

145. *Id.* at 632.

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

150. *Loveless*, 64 S.W.3d at 564.

151. *Id.* at 569.

152. *Crowson v. Wakeham*, 897 S.W.2d 779, 780 (Tex. 1995).

153. *Id.* at 783.

154. TEX. PROB. CODE ANN. § 55(a) (Vernon 2003).

155. *Loveless*, 64 S.W.3d at 570.

ciency.¹⁵⁶ As a result, the appellate court had jurisdiction to hear the appeal.¹⁵⁷

2. Award of Expenses

Problems may result when an appeal of an award of expenses is not brought within the time period specified under Texas Rule of Appellate Procedure 26.1,¹⁵⁸ as illustrated in the case of *In re Estate of Figueroa-Gomez*.¹⁵⁹ First, Decedent's estate was closed.¹⁶⁰ Thereafter, Dependent Administrator obtained court approval for expenses she incurred in administering the estate.¹⁶¹ Independent Administrator then replaced Dependent Administrator as the personal representative of the estate.¹⁶² Independent Administrator subsequently asked the court to set aside the award of expenses.¹⁶³ The court refused to do so, and thus Independent Administrator appealed.¹⁶⁴

The appellate court affirmed.¹⁶⁵ The court held that it had no jurisdiction to hear an appeal of the award of expenses because Independent Administrator waited over one year to appeal.¹⁶⁶ The trial court's order was a final judgment according to section 312(d) of the Texas Probate Code.¹⁶⁷ Because Independent Administrator did not appeal this order in a timely fashion, the judgment became final and not subject to collateral attack.¹⁶⁸

C. TRANSFER

1. From District Court by Probate Court

*In re Swept*¹⁶⁹ teaches the important lesson that merely because an action may impact the claims of an estate through collateral estoppel, it is not sufficient to classify an action as appertaining to or incident to an estate. Testatrix died in 1976 and the probate court admitted her will in 1977.¹⁷⁰ After a long and complex series of events, a suit was filed in the district court concerning royalty payments on an overriding royalty interest owned by a partnership in which Testator, and subsequently her estate, were former partners.¹⁷¹ Under section 5B of the Texas Probate

156. *Id.* at 570-71.

157. *See Id.* at 569-70.

158. TEX. R. APP. P. § 261.

159. *In re Estate of Figueroa-Gomez*, 76 S.W.3d 533 (Tex. App.—Corpus Christi 2002, no pet.).

160. *Id.* at 534.

161. *Id.* at 534-35.

162. *Id.* at 535.

163. *Id.*

164. *Id.*

165. *Id.* at 537.

166. *Id.*

167. *Id.* (citing TEX. PROB. CODE ANN. § 312(d) (Vernon 2002)).

168. *Id.* at 535-36.

169. *In re Swept*, 85 S.W.3d 800 (Tex. 2002).

170. *Id.* at 801.

171. *Id.*

Code,¹⁷² the probate court transferred to itself the district court lawsuit.¹⁷³ One of the parties to the district court proceeding objected, claiming that the district court action was not appertaining to or incident to Testatrix's estate, and thus the transfer order was improper.¹⁷⁴ The court of appeals determined that the transfer was proper.¹⁷⁵

The Texas Supreme Court disagreed, conditionally granted mandamus, and directed the probate court to vacate its order transferring the district court action.¹⁷⁶ The personal representative of the estate was not and had never been a party to the district court action.¹⁷⁷ Accordingly, transfer under section 5B would be proper only if the district court action was appertaining to or incident to Testatrix's estate.¹⁷⁸

The court recognized that there are two ways an action may be appertaining to or incident to an estate.¹⁷⁹ First, the cause of action may be expressly listed in section 5A(b), and second, the controlling issue in the suit may be the settlement, partition, or distribution of an estate.¹⁸⁰ The district court action was not included in the statutory list. Therefore, the only way for the probate court to have the authority to transfer was if the controlling issue in the district court action related to the settlement, partition, or distribution of Testatrix's estate.¹⁸¹ After conducting an extensive review of the pleadings, evidence, and prior judicial authority on the issue, the court held that the district court action was not appertaining to or incident to the estate.¹⁸²

2. Discretionary Nature of Transfer

The case of *In re Azle Manor, Inc.*,¹⁸³ arose when a will contest was pending in a statutory probate court and Executor filed a survival action in district court.¹⁸⁴ Defendants in the district court action requested that the probate court transfer the survival action to itself under section 5B of the Texas Probate Code.¹⁸⁵ The probate court refused.¹⁸⁶ Defendants then asked the appellate court to grant a writ of mandamus to force the probate court to transfer the action.¹⁸⁷

172. TEX. PROB. CODE ANN. § 5B (Vernon 2002).

173. *Swepti*, 85 S.W.3d at 801.

174. *Id.*

175. *Id.* (denying mandamus relief).

176. *Id.* at 801.

177. *Id.* at 804.

178. *Id.*

179. *Id.* at 805.

180. *Id.*

181. *Id.*

182. *Id.* at 808.

183. *In re Azle Manor, Inc.*, 83 S.W.3d 410 (Tex. App.—Fort Worth 2002, orig. proceeding [leave denied]).

184. *Id.* at 411-12.

185. *Id.* at 412.

186. *Id.*

187. *Id.*

The appellate court refused to grant the writ and rejected Defendants' argument that the probate court had exclusive, mandatory jurisdiction over the survival action because the probate court proceedings pre-dated the survival action and were still pending.¹⁸⁸ The court examined section 5B and concluded that the probate court's ability to transfer is purely discretionary.¹⁸⁹ The section provides that the statutory probate court judge "may" transfer a case pending in the district court when it is appertaining to or incident to an estate pending in the statutory probate court.¹⁹⁰ The appellate court found that there was no evidence that the probate judge's refusal to transfer the case was an abuse of discretion.¹⁹¹

The court rejected the argument that the part of section 5B that provides that a cause of action appertaining to or incident to an estate "shall" be brought in the statutory probate court limits or restricts the discretionary language with regard to the probate court's ability to transfer the case.¹⁹² The court held "that the intent of this language is to direct parties with a cause of action appertaining to estates or incident to an estate to bring such actions in statutory probate court in the first instance rather than district court."¹⁹³

This case teaches that, if an action appertaining to or incident to an estate that is pending in a statutory probate court is brought in district court, the person unhappy with the district court's hearing the case should have the district court abate the case under section 5B of the Texas Probate Code because it was brought in the wrong court, rather than relying on the probate court's permissive ability to transfer the case to itself.

D. HEIR REPRESENTING ESTATE

*Casillas v. Cano*¹⁹⁴ demonstrates that a person attempting to appeal a decision against a now-deceased person should either be appointed as the personal representative or be certain to prove the facts necessary to demonstrate the person's right to maintain the appeal. A judgment existed against Intestate at the time of her death.¹⁹⁵ Heir filed an appeal without first being appointed as the administrator of Intestate's estate.¹⁹⁶ The court held that, based on *McC Campbell v. Henderson*,¹⁹⁷ Heir could represent herself in the appeal if she could demonstrate that (1) she is actually an heir, (2) no administration is pending or planned on Intestate's estate, (3) no personal representative has been appointed, and (4)

188. *Id.* at 414-15.

189. *Id.* at 414.

190. *Id.*

191. *Id.* at 413.

192. *Id.* at 414.

193. *Id.*

194. *Casillas v. Cano*, 79 S.W.3d 587 (Tex. App.—Corpus Christi 2002, no pet.).

195. *Id.* at 589.

196. *Id.*

197. *McC Campbell v. Henderson*, 50 Tex. 601 (1879).

no administration is necessary or desired by individuals interested in In-testate's estate.¹⁹⁸

E. FIDUCIARY DUTIES

*Avary v. Bank of America*¹⁹⁹ shows that an executor defending a breach of fiduciary duty claim brought by an estate beneficiary will have a difficult time obtaining a sustainable summary judgment. Decedent died as the result of a tractor accident triggering the filing of wrongful death and survival claims.²⁰⁰ Independent Executor, Guardian of the estates of Decedent's minor children, and Defendants participated in a court-order mediation, which resulted in a court-approved settlement.²⁰¹ Guardian contended that Defendants had made a settlement offer to Independent Executor that Independent Executor had improperly rejected.²⁰² Later, Independent Executor accepted a lower offer.²⁰³ Guardian claims Independent Executor's rejection of the original offer was a breach of Independent Executor's fiduciary duties.²⁰⁴ The lower court granted Independent Executor's request for a summary judgment.²⁰⁵ Guardian appealed.²⁰⁶

The appellate court reversed.²⁰⁷ The court held that Guardian had presented more than a scintilla of evidence to support the allegation that Independent Executor breached its fiduciary duties by failing to disclose material facts affecting the rights of the estate beneficiaries.²⁰⁸ Accordingly, summary judgment was improper.²⁰⁹

F. COMPENSATION

*In re Estate of Figueroa-Gomez*²¹⁰ explains that a court may properly award a statutory commission to a dependent administrator, even if the approval comes after the court appoints an independent administrator. Decedent's estate was closed.²¹¹ Independent Administrator then replaced Dependent Administrator as the personal representative of the estate.²¹² Two months after being removed from office, Dependent Administrator requested and obtained court approval for a statutory commission.²¹³ Independent Administrator subsequently asked the court to

198. *Casillas*, 79 S.W.3d at 590 (citing *Henderson*, 50 Tex. at 611).

199. *Avary v. Bank of Am.*, 72 S.W.3d 779 (Tex. App.—Dallas 2002, pet. denied).

200. *Id.* at 784-85.

201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.* at 786.

206. *Id.*

207. *Id.* at 803.

208. *Id.* at 791.

209. *Id.* at 793.

210. *Figueroa-Gomez*, 76 S.W.3d 533 (Tex. App.—Corpus Christi 2002, no pet.).

211. *Id.* at 534.

212. *Id.* at 535.

213. *Id.*

set aside the compensation award.²¹⁴ The court refused to do so and Independent Administrator appealed.²¹⁵

The appellate court affirmed.²¹⁶ The court began its analysis by explaining that the trial court had authority to award a statutory commission under section 241 of the Texas Probate Code.²¹⁷ The court rejected Independent Administrator's claim that no commission could be awarded because Dependent Administrator had not filed the administrator's oath.²¹⁸ The evidence showed that Dependent Administrator had indeed filed an oath as a temporary administrator and that the commission claim was for actions she took while serving as the temporary administrator.²¹⁹

The court also rejected Independent Executor's argument that the trial court had no jurisdiction to award a commission because the estate had become an independent administration at the time the court made the award.²²⁰ Even though the original dependent administration ceased to exist when the independent administration began, the trial court retained jurisdiction over matters relating to the estate.²²¹ The court quoted section 145(h) of the Texas Probate Code, which provides that actions subsequent to the filing of the inventory, appraisal, and list of claims by an independent executor should proceed without court involvement.²²² However, that section also provides that court involvement is proper if the Probate Code specifically provides for court action, as it does with regard to the payment of a commission under section 241 (requiring the court to act on applications from both dependent and independent administrators and requiring a court finding that the estate was managed in compliance with Probate Code standards).²²³

G. CREDITOR'S CLAIMS

*Gorham v. Gates ex. rel. Estate of Badouh*²²⁴ shows that a creditor of a beneficiary should not expect the administration of the estate of the beneficiary's benefactor to resolve all of the creditor's concerns. Testatrix devised real property to Beneficiary.²²⁵ Creditors of Beneficiary planned to recover their claims from this property.²²⁶ Beneficiary then attempted to disclaim her interest in this property, but the disclaimer was invalid.²²⁷ Under court order, the real property was sold free and clear of all claims

214. *Id.*

215. *Id.*

216. *Id.* at 537.

217. *Id.* at 536 (citing TEX. PROB. CODE ANN. § 241 (Vernon 2003)).

218. *Id.*

219. *Id.*

220. *Id.*

221. *Id.* at 537.

222. *Id.* (quoting TEX. PROB. CODE ANN. § 145(h) (Vernon 2003)).

223. *Id.*

224. *Gorham v. Gates ex. rel. Estate of Badouh*, 82 S.W.3d 359 (Tex. App.—Austin 2002, pet. denied).

225. *Id.* at 361.

226. *Id.* at 362.

227. *Id.*

and the proceeds were placed in the registry of the court subject to Creditors' claims.²²⁸ Creditors appealed asserting that the proceeds should have been immediately disbursed to them.²²⁹

The appellate court affirmed.²³⁰ The court explained that prior court proceedings dealt only with the validity of Beneficiary's disclaimer.²³¹ These proceedings did not resolve the validity of Creditors' claims.²³² The court order authorizing the sale merely stated that the property needed to be sold to satisfy claims and administrative expenses, not just Creditors' claims.²³³ The court order did not prioritize the claims.²³⁴ Accordingly, it was appropriate for the probate court to require the proceeds to be placed in the registry of the court until the validity and priority of Creditors' claims could be determined.²³⁵ The court also indicated that Creditors' reliance on section 338 of the Texas Probate Code was misplaced because that section deals with claims against the decedent, not claims against a beneficiary.²³⁶

IV. TRUSTS

A. TRUSTEE'S POWERS

As shown in *Casillas v. Cano*,²³⁷ a trustee does not have the ability to represent a settlor or the settlor's estate. Here, Settlor established an inter vivos trust naming Daughter as both a cotrustee and beneficiary.²³⁸ After Settlor's death, Daughter contended that she could act on behalf of Settlor with regard to a lawsuit which was pending when Settlor died.²³⁹

The court rejected Daughter's claim.²⁴⁰ The Trust Code grants a trustee a full range of powers to fully represent the interests of the trust.²⁴¹ However, these powers do not include permitting a trustee to represent a settlor or the settlor's estate.²⁴² Thus, Daughter, as Trustee, had no standing to prosecute the appeal on behalf of Settlor or her estate.

B. SECTION 142 TRUSTS

In *Texas State Bank v. Amaro*,²⁴³ Beneficiary of a multi-million dollar

228. *Id.* at 362-63.

229. *Id.* at 363.

230. *Id.* at 366.

231. *Id.* at 363.

232. *Id.*

233. *Id.* at 364.

234. *Id.*

235. *Id.* at 366.

236. *Id.* at 364 (referring to TEX. PROB. CODE ANN. § 338 (Vernon 2003)).

237. *Casillas*, 79 S.W.3d at 587.

238. *Id.*

239. *Id.*

240. *Id.*

241. *Id.*

242. *Id.* at 589-90.

243. *Tex. State Bank v. Amaro*, 87 S.W.3d 538 (Tex. 2002).

trust, created under section 142.005 of the Texas Property Code²⁴⁴ by the 206th district court, decided that he wanted to obtain the trust property free of trust.²⁴⁵ He eventually obtained a court order from a *different* district court declaring that he had regained full capacity, after which he demanded that Trustee transfer all trust assets to him.²⁴⁶ Trustee complied, but only after obtaining a court order from the original district court that terminated the trust.²⁴⁷ The order also released Trustee of all liability since Trustee had at all times properly and appropriately administered the trust.²⁴⁸ Beneficiary contended that the court lacked jurisdiction to issue these orders.²⁴⁹

The appellate court found that the 206th district court had continuing jurisdiction over the trust, both under section 142.005 and the order creating the trust.²⁵⁰ Accordingly, the 206th district court was not bound by the other district court's determination that Beneficiary had regained capacity. The court also found that Trustee properly sought a declaratory judgment to determine whether Beneficiary had regained capacity and the trust had ended as well as to approve the final accounting and various fees.²⁵¹ However, the court held that the district court exceeded its jurisdiction when it determined that Trustee had no liability to the trust, Trustee had used a proper investment philosophy, and that all disbursements were proper.²⁵² Trustee appealed.²⁵³

The Supreme Court of Texas began its analysis of this case by agreeing that the 206th district court had continuing jurisdiction over the trust and was thereby not bound by the other district court's capacity determination.²⁵⁴ Likewise, the court affirmed the appellate court's holding that the district court had exceeded and lacked jurisdiction to decide the tort liability and investment philosophy matters.²⁵⁵ However, the court held that the district court did have the power to approve distributions, fees, costs, and expenses.²⁵⁶

V. OTHER ESTATE PLANNING MATTERS

A. PROFESSIONAL RESPONSIBILITY

An estate planner must be extremely leery of representing both husband and wife in the estate planning process. *In re Taylor*²⁵⁷ shows that,

244. TEX. PROP. CODE ANN. § 142.005 (Vernon 1995 & Supp. 2003).

245. *Tex. State Bank*, 87 S.W.3d at 540-41.

246. *Id.*

247. *Id.* at 541.

248. *Id.*

249. *Id.* at 541-42.

250. *Id.* at 542.

251. *Id.*

252. *Id.*

253. *Id.*

254. *Id.*

255. *Id.* at 543.

256. *Id.* at 543-44.

257. *In re Taylor*, 67 S.W.3d 530 (Tex. App.—Waco 2002, no pet.).

if the attorney elects to represent both spouses despite current or potential conflicts of interest, the attorney will likely be precluded from representing either spouse separately with regard to matters even slightly related to the estate planning process.²⁵⁸

Law Firm represented Husband and Wife in the preparation of their estate plans, including wills, powers of attorney, and business matters.²⁵⁹ Later, Law Firm undertook to represent Husband in divorce proceedings against Wife.²⁶⁰ Wife sought to have Law Firm disqualified from representing Husband.²⁶¹ The trial court denied Wife's motion to disqualify, and in response Wife filed a writ of mandamus.²⁶²

The appellate court conditionally granted Wife's request for a writ of mandamus, directing the trial court to vacate the order denying Wife's motion to disqualify Law Firm.²⁶³ The record was clear that Law Firm represented both Husband and Wife with regard to the business and estate matters, thereby creating a conflict of interest for Law Firm to represent Husband in the divorce action.²⁶⁴ Wife did not consent to Law Firm's representation of Husband in the divorce and thus Law Firm was disqualified.²⁶⁵ The trial court's failure to grant Wife's motion was held to be a clear abuse of discretion.²⁶⁶

B. MALPRACTICE

*Moser v. Davis*²⁶⁷ reminds attorneys of the importance of carefully supervising legal secretaries and legal assistants to make certain they do not perform acts which would be the practice of law without a license. Attorney was in the process of preparing reciprocal wills for Husband and Wife.²⁶⁸ Wife contacted Attorney's Secretary with information needed to complete the wills and was told that Attorney was out of town.²⁶⁹ Wife was adamant that the wills needed to be finalized, so Secretary finished preparing them and conducted the will execution ceremony.²⁷⁰ Secretary then squirreled the wills away in the firm's safe deposit box.²⁷¹ Secretary did not inform Attorney about her foray into "attorney-land."²⁷² When Husband died, this sequence of events came to light, including the fact that Secretary may not have prepared the documents properly.²⁷³ Wife

258. *Id.* at 533-54.

259. *Id.* at 531.

260. *Id.* at 532.

261. *Id.*

262. *Id.*

263. *Id.* at 534.

264. *Id.* at 533.

265. *Id.*

266. *Id.* at 534.

267. *Moser v. Davis*, 79 S.W.3d 162 (Tex. App.—Amarillo 2002, no pet.).

268. *Id.* at 166.

269. *Id.*

270. *Id.*

271. *Id.*

272. *Id.*

273. *Id.*

then sued Attorney for malpractice.²⁷⁴ The jury determined that Attorney was not responsible for Secretary's conduct because Secretary acted outside the course and scope of her employment when she prepared the wills and conducted the execution ceremony.²⁷⁵ Wife appealed.²⁷⁶

The appellate court affirmed.²⁷⁷ The court carefully reviewed the evidence and determined that the jury had sufficient grounds to support its finding that Secretary acted outside the scope of her employment.²⁷⁸ There was no evidence to show that her duties were to include tasks which would be considered the practice of law.²⁷⁹

C. NON-PROBATE TRANSFERS

The estate planner must carefully inspect the beneficiary designations on non-probate assets to make certain they provide for the disposition of property the client desires, as *Holley v. Grigg*²⁸⁰ demonstrates. Decedent owned an investment account on the date of his death that named his five children as beneficiaries.²⁸¹ The account also provided that if a beneficiary predeceased Decedent, that beneficiary's share would pass to the surviving children.²⁸² Decedent did not select the option of having a deceased beneficiary's share pass to the deceased beneficiary's children.²⁸³ When Decedent died, one of his children had predeceased him and was survived by a child.²⁸⁴ In a summary judgment order, the trial court held that this child was not entitled to share in the brokerage account under the express terms of the account.²⁸⁵

The appellate court affirmed.²⁸⁶ The brokerage account qualified as a valid nontestamentary transfer under both section 450 of the Texas Probate Code and the equivalent Missouri statute, the state whose law governed the terms of the account.²⁸⁷ The court held that the account agreement was unambiguous.²⁸⁸ Additionally, there was no evidence that, even if Decedent had made a unilateral mistake when he executed the account agreement by not selecting the anti-lapse option, it would not provide the court with a basis to alter the contract.²⁸⁹

274. *Id.*

275. *Id.*

276. *Id.*

277. *Id.*

278. *Id.* at 167-68.

279. *Id.* at 168.

280. *Holley v. Grigg*, 65 S.W.3d 289 (Tex. App.—Eastland 2001, no pet.).

281. *Id.* at 291.

282. *Id.*

283. *Id.*

284. *Id.*

285. *Id.* at 292.

286. *Id.*

287. *Id.* at 293-94 (citing TEX. PROB. CODE ANN. § 450 (Vernon 2001) and MO. REV. STAT. § 461.001 (2002)).

288. *Id.* at 294.

289. *Id.* at 295.

D. INTER VIVOS GIFTS

1. *Evidence to Prove Completed Gift*

*Hayes v. Rinehart*²⁹⁰ serves as a powerful reminder that merely designating a person as the owner of an asset is not sufficient to show that an inter vivos gift occurred. Decedent opened a certificate of deposit ("CD") entirely with his own funds but had the account titled in Daughter's name.²⁹¹ After Decedent died, each of his other two children claimed a one-third interest in the CD.²⁹² The trial court determined that the CD was part of Decedent's estate.²⁹³ Daughter appealed.²⁹⁴

The appellate court affirmed.²⁹⁵ Although Daughter proved that the account was solely in her name, Daughter failed to prove that Decedent made an inter vivos gift of the CD to her.²⁹⁶ The court held that the trial court did not violate the parol evidence rule when it allowed oral testimony from the other children to show fraud.²⁹⁷ The testimony showed that Decedent had placed the funds in Daughter's name to receive Medicaid and other government-supplied benefits.²⁹⁸ The court also held that the trial court's determination that an inter vivos gift of the CD did not occur for lack of donative intent was not so against the overwhelming weight of the evidence as to be clearly wrong or unjust.²⁹⁹

2. *Setting Aside Deeds and Bank Account Contracts*

Just like testamentary transfers, inter vivos transfers may be attacked on grounds that the donor lacked capacity or was subject to undue influence, as shown in *Dubree v. Blackwell*.³⁰⁰ Friend purchased a house and placed it in Donor's name.³⁰¹ Later, Donor deeded the house to Friend.³⁰² Donor also placed Friend's name on a joint account with right of survivorship.³⁰³ After Donor's death, the sole beneficiary of Donor's will sued to set aside the deed and bank account contract, claiming Donor lacked capacity and that Friend asserted undue influence on Donor.³⁰⁴ The jury found that Donor had capacity and was not subject to undue influence.³⁰⁵ Beneficiary appealed.³⁰⁶

290. *Hayes v. Rinehart*, 65 S.W.3d 286 (Tex. App.—Eastland 2001, no pet.).

291. *Id.* at 287.

292. *Id.*

293. *Id.*

294. *Id.* at 289.

295. *Id.* at 288.

296. *Id.* at 289.

297. *Id.* at 288.

298. *Id.*

299. *Id.* at 289.

300. *Dubree v. Blackwell*, 67 S.W.3d 286 (Tex. App.—Amarillo 2001, no pet.).

301. *Id.* at 288.

302. *Id.*

303. *Id.*

304. *Id.*

305. *Id.* at 288-89.

306. *Dubree*, 67 S.W.3d at 288-89.

The appellate court affirmed.³⁰⁷ The court reviewed the evidence in detail and found that the jury's findings were not against the great weight and preponderance of the evidence, and thus, were not manifestly unjust.³⁰⁸

3. Attorney-Client Privilege

*In re Texas A&M-Corpus Christi Foundation, Inc.*³⁰⁹ shows how issues of attorney-client privilege may arise after the death of the donor of an inter vivos gift. Donor made a \$2 million inter vivos gift to Charity.³¹⁰ After Donor died, her Estate claimed that she lacked the mental capacity to make the gift.³¹¹ Charity sought discovery from two attorneys who worked with Donor on estate and trust matters prior to when Donor made the contested inter vivos gift.³¹² Estate and the attorneys asserted that the attorneys were prohibited from testifying because of the attorney-client privilege.³¹³ The court denied Charity's request to compel the discovery and Charity sought mandamus relief.³¹⁴

The appellate court conditionally granted mandamus because the discovery Charity sought was not protected by the attorney-client privilege.³¹⁵ The court first determined that appeal would not be a sufficient remedy because without the requested discovery, the case would be needlessly tried.³¹⁶ The court then concluded that the trial court abused its discretion in denying Charity's motion to compel because the trial court incorrectly determined that the information Charity wanted to discover was protected by the attorney-client privilege.³¹⁷ Texas Rule of Evidence 503(d) provides that "[t]here is no privilege . . . [a]s to a communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by *inter vivos* transactions."³¹⁸ Charity sought testimony from the attorneys, which was relevant to Donor's capacity in an action between parties who were both claiming through the now-deceased Donor.³¹⁹ Accordingly, the attorney-client privilege does not bar the discovery.³²⁰

307. *Id.* at 292.

308. *Id.* at 291.

309. *In re Tex. A&M-Corpus Christi Foundation, Inc.*, 84 S.W.3d 358 (Tex. App.—Corpus Christi 2002, orig. proceeding).

310. *Id.* at 359.

311. *Id.*

312. *Id.* at 359-60.

313. *Id.* at 360.

314. *Id.*

315. *Id.* at 361.

316. *Id.* at 360.

317. *Id.* at 361.

318. *Id.* (quoting TEX. R. EVID. 503(d)).

319. *Id.*

320. *Id.*

